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The Warrant Requirement for Container Searches and the "Well-Delineated" Exceptions: The New "Bright Line" Rules

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In two recent cases, Robbins v. California *and* New York v. Belton, *the Supreme Court of the United States established standardized rules for determining when police may conduct a warrantless search of a closed container seized from an automobile. The author analyzes these cases and argues that their holdings do not conform to the policies underlying traditional exceptions to the fourth amendment's warrant requirement. The author suggests that the Supreme Court will probably change these rules when it decides* United States v. Ross, *a case now pending before the Court.*

I. INTRODUCTION

The fourth amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[1] The interest that the fourth amendment protects has been defined as a person's legitimate expectation of privacy.[2] To protect this interest, the United States Supreme Court favors judicial determination of the reasonableness of a search. Although most warrantless searches are per se unreasonable, the Court has recognized exceptions to this rule in a few "specifically estab-

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1. U.S. CONST. amend. IV.

2. United States v. Katz, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

lished" and "well-delineated" situations.[3]

Much of fourth amendment jurisprudence has involved balancing the individual's privacy interest against the countervailing needs of society. When a person's expectation of privacy is particularly low, or the needs of society are particularly great, courts establish an exception to the warrant requirement.[4] The facts and circumstances of a particular case are usually crucial in determining whether a given search falls within one of these exceptions. Further, because every exception to the warrant requirement invariably impinges on an individual's fourth amendment rights, courts are often faced with a constitutional "line-drawing process" in search and seizure cases.[5]

The most common exceptions to the fourth amendment warrant requirement are the automobile search,[6] the plain view doctrine,[7] and the search incident to arrest.[8] The outcome of search and seizure cases often depends on whether a court finds a warrantless search constitutional under one of these exceptions. In a frequently litigated situation, for example, the police stop an automobile on the road, arrest the driver, and conduct a warrantless search of a closed container found in the car. This fact pattern raises several search and seizure issues: First, does the type of container searched determine whether the fourth amendment protects its owner's expectation of privacy from warrantless searches? Second, what is the relationship between the fourth amendment's warrant requirement and the exceptions to this requirement carved out by the courts in their "line-drawing process"? Finally, can courts better protect fourth amendment rights using standardized rules instead of a case-by-case analysis?

In two recent cases, *Robbins v. California*[9] and *New York v. Belton*,[10] the Supreme Court of the United States attempted to resolve these questions. Rather than pursue its usual course of deter-

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3. *Id.* at 357 (plurality opinion).

4. *See* Arkansas v. Sanders, 442 U.S. 753, 759-60 (1979). *But cf.* Comment, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461, 1472-77 (1977) (criticizing the use of a balancing test for determining fourth amendment rights).

5. Arkansas v. Sanders, 442 U.S. at 757.

6. *See* Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

7. *See* Coolidge v. New Hampshire, 403 U.S. 443, 464-71 (1971).

8. *See* United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

9. 453 U.S. 420 (1981).

10. 453 U.S. 454 (1981). The Supreme Court decided both *Robbins* and *Belton* on the same day.

mining fourth amendment rights based on the particular facts and circumstances of a case, the Court established "bright line" rules that it believed the police and the lower courts could easily understand and apply. This article will review these cases and discuss the implications of the new rules and their relationship to the recognized exceptions to the warrant requirement. These standardized rules do not conform to previously "established principles" of fourth amendment jurisprudence. By granting certiorari in *United States v. Ross*,[11] the Court is already beginning to reconsider the viability of these rules.

II. The Recent Cases

In *Robbins v. California*,[12] California Highway Patrol officers stopped Robbins for driving erratically. Upon smelling marijuana smoke in Robbins's station wagon, the officers searched the passenger compartment and discovered marijuana and drug-related paraphernalia.[13] While they were gathering this evidence, Robbins told the officers that the object of their search was in the back of the car.[14] The officers put Robbins in their patrol car and then opened a recessed luggage compartment inside the station wagon's tailgate. There they found two fifteen-pound bricks of marijuana, each wrapped in green opaque plastic.[15]

The trial court denied Robbins's motion to suppress the evidence found in the plastic bags, and the jury convicted him of various drug offenses.[16] The Supreme Court of the United States, in a plurality opinion written by Justice Stewart, reversed the conviction and held that the police should not have searched the closed opaque containers without a warrant, even though they were found during a lawful search of an automobile.[17] In arriving at its decision, the plurality established two "bright line" rules. First, the

11. United States v. Ross, 655 F.2d 1159 (D.C. Cir.) (en banc), *cert. granted*, 102 S. Ct. 386 (1981).

12. 453 U.S. 420 (1981).

13. *Id.* at 422.

14. *Id.* at 442 (Rehnquist, J., dissenting).

15. *Id.* at 422 & n.1.

16. *Id.* at 422-23. In an unpublished opinion, the California court of appeal affirmed the conviction. *Id.* at 423. The United States Supreme Court vacated this judgment and remanded the case for consideration in light of Arkansas v. Sanders, 442 U.S. 753 (1979). The California Court of Appeals again upheld the search, concluding that Robbins had no reasonable expectation of privacy in the containers because the officers could infer the containers' contents from their outer appearance. People v. Robbins, 103 Cal. App. 3d 34, 162 Cal. Rptr. 780 (1980).

17. 453 U.S. at 428.

fourth amendment protects all closed opaque containers from warrantless searches;[18] and second, a container taken from an automobile has the same fourth amendment protection as one seized elsewhere.[19]

New York v. Belton[20] involved similar facts. A New York state patrolman stopped a speeding car in which Belton and three other men were riding. The officer smelled marijuana and saw an envelope on the floor of the car marked "supergold," which he associated with marijuana. The officer subsequently discovered that none of the occupants owned the car or was related to the owner. After asking the men to step out of the car, the officer arrested them for possession of marijuana. While searching the passenger compartment of the vehicle, the officer found marijuana in the envelope and discovered cocaine in a zippered pocket of Belton's jacket which lay on the back seat.[21]

On appeal, the Supreme Court mustered a majority and, in an opinion written by Justice Stewart, concluded that the warrantless search of Belton's jacket was constitutional. The Court established another "bright line" rule, holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the *passenger compartment* of that automobile."[22] The officer also may open and search any closed container which he finds inside that compartment.[23] The Court stated that the passenger compartment includes the glove compartment and console, but does not include the trunk.[24]

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18. *Id.* at 426.

19. *Id.* at 428-29.

20. *Id.* at 454.

21. *Id.* at 455-57. The trial court denied Belton's motion to suppress the cocaine. As a result, he pled guilty to a lesser offense, reserving his right to appeal. The Appellate Division of the New York Supreme Court affirmed the lower court's order, holding that the officer's search was justified as an incident to Belton's arrest. People v. Belton, 68 A.D.2d 198, 416 N.Y.S.2d 922 (1979). The New York Court of Appeals reversed, holding that the warrantless search was not incident to arrest because Belton and the other men were in custody before the search and could not gain access to the seized evidence. 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980).

22. 453 U.S. at 460 (emphasis added) (footnotes omitted).

23. *Id.* at 460-61.

24. *Id.* at 460 n.4. The *Belton* Court did not hold that a car's trunk could not be searched incident to arrest. The Court simply limited its holding to the passenger compartment. Justice Powell, discussing the *Belton* holding, suggested a distinction between an automobile's passenger compartment and its trunk: "Immediately preceding the arrest, the passengers have complete control over the entire interior of the automobile, and can place weapons or contraband into pockets or other containers as the officer approaches . . . .

The Supreme Court's decision that the warrantless search of Belton's jacket was constitutional is difficult to reconcile with its holding that the warrantless search of Robbins's plastic bags was not. In both *Belton* and *Robbins*, the police searched a closed container found within a car after lawfully stopping the car on the highway and arresting its occupant. The apparent conflict between these two cases is even more disturbing when one considers that the police officers in *Robbins* had probable cause to believe that the seized containers held contraband, while the officer in *Belton* did not. One possible explanation is that *Robbins* and *Belton* were argued on different theories. The search incident to arrest exception was not before the Court in *Robbins*,[25] while the Court considered only that exception in *Belton*. Understanding the implications of *Robbins* and *Belton*, therefore, requires a careful analysis of the general principles applicable to claims of fourth amendment violations.

III. The Warrant Requirement for Container Searches

Two previous Supreme Court cases recognized that an individual has a substantially greater expectation of privacy in his personal luggage than in his automobile. In *United States v. Chadwick*,[26] federal agents had probable cause to believe that a two hundred-pound, double-locked footlocker contained marijuana.[27] The agents watched the defendants claim the footlocker at a railroad station, take it to a car, and then load it into the car's trunk. Before the defendants had closed the trunk or started the car, the agents arrested them and seized and subsequently searched the footlocker.[28] The Court held that although the footlocker was lawfully seized, the warrantless search of its contents was an unconstitutional invasion of the defendants' legitimate expectation of

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These considerations do not apply to the trunk of the car . . . ." Robbins v. California, 453 U.S. at 431-32 (Powell, J., concurring).

25. The *Robbins* Court stated, "In particular, it is not argued that the opening of the packages was incident to a lawful custodial arrest." 453 U.S. at 429 n.3. The only issue litigated in *Robbins* was whether the police required a warrant before opening a sealed opaque container discovered in the luggage compartment of a station wagon. *Id.* at 432 (Powell, J., concurring).

26. 433 U.S. 1 (1977).

27. The petition for certiorari only raised the question of the constitutionality of the footlocker search. Consequently, the Court did not decide whether the agents had probable cause to arrest the defendants. *Id.* at 5 n.1.

28. *Id.* at 3-5.

privacy.[29]

Arkansas v. Sanders[30] extended *Chadwick* to apply to other types of luggage. In *Sanders* police officers acting on a tip from an informant had probable cause to believe that an unlocked suitcase contained marijuana.[31] The officers observed the defendant pick up the suitcase at an airport and load it into the trunk of a waiting cab. The police obtained the cab driver's permission to open the trunk and subsequently searched the suitcase. The Supreme Court concluded that the trial court incorrectly denied a motion to suppress the evidence obtained in the warrantless search. The Court reasoned that a suitcase is a common repository for personal effects invariably associated with a high expectation of privacy.[32] The Court held that, unless the destruction of evidence is likely, a warrantless search of a suitcase is unconstitutional.[33]

After *Sanders* the federal courts of appeals frequently distinguished containers that were analogous to luggage from those that were not. Containers similar to luggage were frequently held to be repositories of personal effects. Even if the police had lawfully seized one of these containers, its contents continued to be associated with independent expectations of privacy that could not be invaded without a warrant.[34]

Containers of a less substantial nature than luggage consequently were subject to warrantless searches. Unable to find some objective or external evidence of an expectation of privacy in these containers, courts have refused to suppress the incriminating evidence obtained without a warrant.[35] The State of California urged the Supreme Court to adopt this distinction in *Robbins*,[36] contending that the fourth amendment protects only privacy interests in

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29. *Id.* at 11.

30. 442 U.S. 753 (1979).

31. *Id.* at 761.

32. *Id.* at 762.

33. *Id.* at 764.

34. *See, e.g.*, United States v. Benson, 631 F.2d 1336 (8th Cir. 1980) (tote bag); United States v. Miller, 608 F.2d 1089 (5th Cir. 1979) (rehearing en banc) (plastic portfolio), *cert. denied*, 447 U.S. 926 (1980); United States v. Presler, 610 F.2d 1206 (4th Cir. 1979) (briefcase); United States v. Meier, 602 F.2d 253 (10th Cir. 1979) (backpack); United States v. Johnson, 588 F.2d 147 (5th Cir. 1979) (duffle bag).

35. *E.g.*, United States v. Mannino, 635 F.2d 110, 114 (2d Cir. 1980) (plastic bag inside paper bag); *see also* United States v. Goshorn, 628 F.2d 697 (1st Cir. 1980) (parcel wrapped in plastic and paper bags); United States v. Mackey, 626 F.2d 684 (9th Cir. 1980) (paper bag).

36. 453 U.S. 420 (1981).

containers commonly used to carry personal effects.[37] Under this argument, the lawfully seized plastic bags in Robbins's car were unlikely repositories for personal effects and were thus subject to a warrantless search.

The *Robbins* plurality rejected this argument, reasoning that the language of the fourth amendment makes no distinction between "personal" and "impersonal" effects. The Court observed that "[o]nce placed within . . . a container, a diary and a dishpan are equally protected by the Fourth Amendment" because "[w]hat one person may put into a suitcase, another may put into a paper bag."[38] The plurality was also unable to find any objective criteria for distinguishing privacy interests associated with different types of containers.[39]

The state in *Robbins* also argued that the nature of the defendant's plastic packages permitted the officers to infer that the packages contained marijuana.[40] One of the arresting officers even testified that he was aware that contraband frequently was transported in this fashion.[41] These facts, the state contended, made the search of Robbins's plastic bags constitutional under an exception to the warrant requirement suggested in *Arkansas v. Sanders*:[42]

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because *their contents can be inferred* from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.[43]

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37. *Id.* at 425.

38. *Id.* at 426 (citing United States v. Ross, 655 F.2d 1159 (D.C. Cir.) (en banc), *cert. granted*, 102 S. Ct. 386 (1981)). In *Ross* the court held that no distinguishable difference existed between a paper bag and a leather pouch that the police had seized from the respondent's trunk and searched. For a discussion of *Ross*, see *infra* notes 135-46 and accompanying text.

39. 453 U.S. at 426-27. Attempting to distinguish the privacy interest among different types of containers would be an impossible task for the police and the courts. The police could not rely on the size of the container, the material from which it was made, or the manner in which it was sealed in determining whether to obtain a warrant before searching it. *See* United States v. Ross, 655 F.2d 1159 (D.C. Cir.) (en banc), *cert. granted*, 102 S. Ct. 386 (1981).

40. 453 U.S. at 426-27. The California court of appeal relied on this theory in affirming Robbins's conviction. *See supra* note 16.

41. 453 U.S. at 428.

42. Arkansas v. Sanders, 442 U.S. 753 (1979).

43. *Id.* at 764 n.13 (emphasis added).

The *Robbins* Court expanded the warrant requirement by rejecting the argument that Robbins's plastic packages fell within this exception. The Court explained that the last sentence of the exception suggested in *Sanders* applied to items in an open container, and that the first part of the exception "is likewise little more than another variation of the 'plain view' exception."[44] The nature of a container must do more than intimate its contents to fall within the *Sanders* exception; its contents must be *"obvious to an observer."*[45] Although an open, transparent, or distinctively shaped container might have satisfied this requirement, the packages in Robbins's car did not. By acknowledging the *Sanders* variation of the plain view doctrine, the *Robbins* plurality blurred its otherwise "bright line" rule that the nature of a container does not affect fourth amendment protection of its owner's interests.[46]

Other Justices on the Supreme Court agreed with the plurality's first "bright line" rule, and it appears to be a reliable precedent. Justices Blackmun and Stevens favor eliminating distinctions among different types of containers when determining fourth amendment rights.[47] Only Justice Powell would continue to use the nature of the container as a basis for determining its owner's expectation of privacy.[48] Powell concurred in the Court's judgment only because he believed the manner in which Robbins had wrapped and sealed his packages demonstrated that he had a sufficient expectation of privacy in their contents to preclude a war-

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44. 453 U.S. at 427. The plain view doctrine allows an officer to seize contraband or evidence which is in plain view without a warrant. Several restrictions limit the exception. The officer must have a lawful right to be where he can see the object in plain view. The nature of the object must be immediately apparent and its discovery inadvertent. Property cannot be seized under the plain view exception when the officer has prior reason to know that he will discover evidence during a search. In that situation, the officer must obtain a warrant. When these criteria are satisfied, an owner has no constitutionally protected expectation of privacy in an exposed object. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971).

45. 453 U.S. at 428 (emphasis added).

46. The Court failed to explain how an officer should determine whether the container's contents are sufficiently obvious to permit a warrantless search. For example, only laboratory analysis can positively identify a heroin capsule in a clear plastic bag. Yet its identity may be obvious to a narcotics agent in light of his experience and knowledge of the circumstances. The criminal nature of the capsule, however, may not be obvious to an average citizen. *See* United States v. Sanders, 631 F.2d 1309, 1315 (8th Cir. 1980).

47. Robbins v. California, 453 U.S. at 446-47 (Stevens, J., dissenting).

48. *Id.* at 434 n.3 (Powell, J., concurring). Justice Powell believes that a trial court should conduct a hearing to determine whether the defendant manifested a reasonable expectation of privacy in a container. Factors relevant to the decision would be the nature of the container, the situation in which it was discovered, and whether its owner had taken precautions, such as locking, sealing, or binding it to protect his privacy.

rantless search.[49]

IV. THE AUTOMOBILE EXCEPTION

Unlike the warrant requirement for container searches, the "automobile exception" has allowed police to conduct warrantless searches of automobiles for over fifty years. The Supreme Court established the exception in *Carroll v. United States*[50] by holding that an officer who stops a car on the road with probable cause to believe that it contains contraband may search the vehicle without a warrant. The Court reasoned that the inherent mobility of the automobile is an exigent circumstance justifying the warrantless search.[51]

The inherent mobility of the automobile, however, only partially explains the automobile exception. A closed container has the same mobility as the car in which it is located.[52] Unlike a container, the automobile is associated with a low expectation of privacy because "its function is transportation and it seldom serves as . . . a repository of personal effects . . . . It travels public thoroughfares where both its occupants and its contents are in plain view."[53] A car owner's expectation of privacy is diminished further because the automobile is subject to state regulations and inspections that often allow police to take it into custody.[54]

In *Chambers v. Maroney*,[55] the police had probable cause to believe that a car contained loot from a robbery. The police stopped the car, arrested its occupants, and after taking the vehicle to the police station, searched it. Although the police had both the car and its occupants in custody, and presumably had time to obtain a warrant, the Court held that the warrantless search of the car was constitutional under the automobile exception. The Court explained its reasoning as follows:

> Arguably, because of the preference for a magistrate's judg-

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49. *Id.* at 429. Robbins's packages were wrapped with clear plastic over an inner layer of opaque plastic. Each layer was taped closed. *Id.* at 422 n.1.

50. 267 U.S. 132 (1925).

51. *Id.* at 153.

52. *See* United States v. Chadwick, 433 U.S. 1, 3-4 (1977).

53. *Id.* at 12 (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974)).

54. 433 U.S. at 11. The Supreme Court has relied increasingly on the diminished expectation of privacy associated with automobiles to allow warrantless vehicle searches. The Court has upheld searches of immobile vehicles already in police custody even when the police lacked probable cause to believe that the car contained evidence of a crime. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973).

55. 399 U.S. 42 (1970).

> ment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the "lesser" intrusion is permissible until the magistrate authorizes the "greater." But which is the "greater" and which the "lesser" intrusion is itself a debatable question . . . .[56]

The Court concluded that when a police officer has probable cause to search a stopped automobile, he may take it to the police station and search it there. This search is reasonable under the fourth amendment.[57]

Individuals predictably associate some parts of a car with a greater expectation of privacy than others. For example, an automobile's glove compartment and trunk are closed and frequently locked. The Supreme Court has failed to make this distinction and has upheld, under the automobile exception, the search of various compartments within a car.[58] Several United States courts of appeals have relied on the automobile exception to uphold warrantless searches of closed containers removed from a car when the nature of the container did not support a finding of an independent expectation of privacy.[59] The *Robbins* plurality, however, rejected distinctions based on the nature of a seized container.[60] As a result, when a container is located within a car, the warrant requirement for container searches and the automobile exception to the warrant requirement conflict.

Although the *Robbins* plurality did not expressly decide the issue, the automobile exception apparently will continue to permit warrantless searches of the car's closed compartments. The *Robbins* Court did not question the constitutionality of the search of the defendant's luggage compartment.[61] Instead, the Court held that the automobile exception, which grants police the authority to open a closed compartment, does not permit warrantless searches of closed opaque containers found inside.[62] Relying on *United*

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56. *Id.* at 51.

57. *Id.* at 52.

58. *See, e.g.*, South Dakota v. Opperman, 428 U.S. at 366 (glove compartment); Texas v. White, 423 U.S. 67, 68 (1975) (per curiam) (passenger compartment); Cady v. Dombrowski, 413 U.S. at 437 (trunk); Chambers v. Maroney, 399 U.S. at 44 (concealed compartment under the dashboard).

59. *See, e.g.*, United States v. Mannino, 635 F.2d 110, 114 (2d Cir. 1980); United States v. Goshorn, 628 F.2d 697, 700-01 (1st Cir. 1980); United States v. Mackey, 626 F.2d 684, 687-88 (9th Cir. 1980).

60. 453 U.S. at 425-27.

61. *Id.* at 428-29.

62. *Id.*

States v. Chadwick[63] and *Arkansas v. Sanders*,[64] the *Robbins* plurality stated that these "cases [make it] clear . . . that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else."[65] But fourth amendment protection from warrantless searches applies not only to luggage, but also to all closed containers. Accordingly, the *Robbins* plurality established its second "bright line" rule restricting the automobile exception. Police officers now must obtain a warrant before searching any closed opaque container seized from an automobile.[66]

This restriction of the automobile exception has doubtful precedential value because a majority of the Court does not support it. In separate dissenting opinions, Justices Blackmun,[67] Rehnquist,[68] and Stevens[69] explicitly rejected this rule. Each of these Justices would hold that a warrant is not required to seize and search any personal property found during a lawful search of an automobile, including property in a closed container.

In his concurring opinion, Justice Powell found merit in the dissenters' position.[70] He stated that resolving the case by expanding the automobile exception might enable the Court to form a majority.[71] This result also would be consistent with *Chadwick* and *Sanders*, because neither case involved the automobile exception.[72] In both cases, law enforcement officials had probable cause to search the seized containers before they were placed in a vehicle. The rationale behind these cases was that an officer's duty to obtain a warrant could not be avoided by the simple expedient of waiting until a container came in contact with a car.[73] Unlike the plurality, Justice Powell veiwed *Robbins* as just another container case[74] and disapproved of the plurality's "bright line" rule. Noting

63. 433 U.S. 1 (1977); *see supra* notes 26-29 and accompanying text.

64. 442 U.S. 753 (1979); *see supra* notes 30-32 and accompanying text.

65. 453 U.S. at 425.

66. *See id.* at 428-29. The opinion goes beyond the facts of the case: "We affirm today that [a closed, opaque] container may not be opened without a warrant, even if it is found during the course of the lawful search of an automobile." *Id.* at 428.

67. *Id.* at 436 (Blackmun, J., dissenting).

68. *Id.* at 437 (Rehnquist, J., dissenting).

69. *Id.* at 444 (Stevens, J., dissenting).

70. *Id.* at 429 (Powell, J., concurring).

71. *Id.*

72. *Id.* The plurality relied on both Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977) in formulating its decision.

73. 453 U.S. at 446 (Stevens, J., dissenting).

74. *Id.* at 429 (Powell, J., concurring).

that the parties had not litigated the automobile exception, the Justice remarked that "it is [too] late in the Term for us to undertake *sua sponte* reconsideration of basic doctrines."[75]

The hypothetical majority that Justice Powell contemplated would have to include Chief Justice Burger, who concurred without opinion in the *Robbins* decision. The Chief Justice has insisted that neither *Chadwick* nor *Sanders* involved the automobile exception. In writing the *Chadwick* opinion, he stated that "[t]he Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search . . . ."[76] In his concurring opinion in *Sanders,* he explained his unwillingness to join the majority: "I . . . cannot join its unnecessarily broad opinion, which seems to treat this case as if it involved the 'automobile' exception to the warrant requirement. It is not such a case."[77] Burger reasoned that the focus of the search in *Sanders* was on a particular piece of luggage, coincidentally located in an automobile at the time of the search, rather than on the automobile itself. He proceeded to clarify this distinction:

> This case simply does not present the question of whether a warant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle, but when they do *not* know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure.[78]

Although the Chief Justice does not state whether opening luggage in this situation should require a warrant, his opinion indicates a reluctance to restrict the automobile exception unnecessarily.

Robbins will severely restrict the automobile exception and place an unjustifiable burden on police officers.[79] While conducting a warrantless search under the automobile exception, an officer will often find closed containers inside the car. Under the plurality's second "bright line" rule, the officer may not open these containers. Instead, the officer must seize the containers and leave his

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75. *Id.* at 435-36. The issue whether the automobile exception permits a warrantless search of a container located in a vehicle was raised only in the United States Government's amicus curiae brief. 453 U.S. at 425.

76. 433 U.S. at 11.

77. 442 U.S. at 766 (Burger, C.J., concurring).

78. *Id.* at 767 (emphasis in original).

79. Robbins v. California, 453 U.S. at 429 (Powell, J., concurring); *id.* at 436 (Blackmun, J., dissenting); *id.* at 437 (Rehnquist, J., dissenting); *id.* at 449 (Stevens, J., dissenting).

other duties to obtain a search warrant, which a magistrate will undoubtedly issue in situations like *Robbins*.[80]

The Court may eventually reject this rule and allow police to conduct warrantless searches of containers found during an automobile search. When the issue is squarely before the Court, the Chief Justice may join Justices Powell, Blackmun, Rehnquist, and Stevens in a majority applying the automobile exception as a specific limitation on the warrant requirement for container searches. This would require limiting *Robbins* to its facts or overruling the case to the extent that it restricts the automobile exception.[81] The Court could justify expanding the automobile exception by reasoning that an individual's expectation of privacy in a container which he places within a car is not significantly greater than the privacy he associates with a locked trunk or glove compartment.[82] Thus, when the police have probable cause to search a container taken from a car, it is debatable whether holding the container until they can obtain a warrant is a lesser intrusion on a person's expectation of privacy than an immediate search.[83]

V. Search Incident to Arrest Exception

The facts of *Robbins* and *Belton* illustrate that probable cause to search a car and probable cause to arrest its occupant often occur simultaneously.[84] Although *Robbins* prohibits warrantless searches of containers lawfully seized from an automobile, the *Belton* Court held that the police may search the entire passenger compartment of a car and any containers found inside as an inci-

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80. *Id.* at 436 (Blackmun, J., dissenting).

81. Three considerations make this result extremely likely. First, the *Belton* Court indicated that its decision was based on the search incident to arrest exception, avoiding the need to address the application of the automobile exception. 453 U.S. at 462 n.6. The literal language of *Robbins* would prevent all warrantless searches of containers found in automobiles. *See supra* note 66. This would severely limit the utility of the automobile exception. Second, Justice Stewart, who wrote both the *Robbins* and *Belton* opinions, has resigned from the Court. Third, the Court granted certiorari in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir.) (en banc), *cert. granted*, 102 S. Ct. 386 (1981), to decide what containers can be searched without a warrant under the automobile exception. *See infra* notes 147-56 and accompanying text.

82. *See* Arkansas v. Sanders, 442 U.S. at 769 (Blackmun, J., dissenting).

83. *See supra* notes 50-52 and accompanying text.

84. *See* Robbins v. California, 453 U.S. at 446-47 (Stevens, J., dissenting). Justice Stevens believed that probable cause to search the defendant's car in *Belton* existed after the officers smelled marijuana smoke in the car. The plurality's assumption in *Robbins* that a similar fact pattern provided the police with probable cause to search the car supported his conclusion. *Id.* at 451 & n.13.

dent to the arrest of the car's occupant.[85]

Arrests create two exigent circumstances that make it impractical for an officer to obtain a search warrant.[86] First, the officer needs to discover any weapons that the arrested person could use to resist the arrest. Second, the officer must discover any evidence that the suspect could destroy or conceal.[87] To achieve these objectives, the Court traditionally has permitted an officer to examine the contents of a closed container seized from a defendant during a search incident to arrest.[88] But the exigency justifying this warrantless search dissipates when the arrest is completed.[89] The Court therefore has held that warrantless searches incident to arrest are unconstitutional when police officers conduct the search after the articles are in their exclusive control.[90]

The *Belton* Court rejected the concept of the officer's "exclusive control" as a meaningful standard for determining whether the search of a container was incident to the arrest.[91] Under that theory, all warrantless searches incident to arrest would be invalid because the officer must always have the article under his exclusive control in order to search it.[92] The Court's new rule would require that the search be a "contemporaneous incident" of the arrest.[93]

Two factors delineate the scope of the search incident to arrest: (1) the search of the person arrested; and (2) the search of the area within the arrestee's control.[94] The Supreme Court has treated these two factors differently; reviewing them separately will reveal the implications of *Belton's* new "bright line" rule.

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85. 453 U.S. at 460-61.

86. *Id.* at 457.

87. *Id.* (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

88. Chimel v. California, 395 U.S. 752, 763 (1969); *see* New York v. Belton, 453 U.S. at 457; United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, 358 U.S. 307 (1959).

89. New York v. Belton, 453 U.S. at 457-58.

90. United States v. Chadwick, 433 U.S. 1, 15 (1977). Although the *Chadwick* opinion states that the exigency of the situation ends when the "property to be searched comes under the exclusive dominion of police," the search in *Chadwick* took place more than an hour after his arrest. *Id.* at 14-15.

91. 453 U.S. at 461 n.5.

92. *Id.*

93. This requirement is entirely consistent with the older requirement that the search must be substantially contemporaneous with the arrest and conducted in the immediate vicinity of the arrest. *See* United States v. Chadwick, 433 U.S. at 14-15; Shipley v. California, 395 U.S. 818, 819 (1969); Stoner v. California, 376 U.S. 483, 486 (1964); Preston v. United States, 376 U.S. 364, 367 (1964). *But see* United States v. Edwards, 415 U.S. 800, 810 (1974).

94. United States v. Robinson, 414 U.S. 218, 224 (1973).

For well over sixty years, the Supreme Court has recognized the authority to search a person incident to arrest.[95] The Court has often referred to it in dicta as an affirmative right to search, rather than as an exception to the warrant requirement.[96] *United States v. Robinson*[97] was the first Supreme Court case to consider the validity of a warrantless search of a person incident to a legal arrest. In *Robinson* an officer had probable cause to arrest Robinson for driving with a revoked operator's license. The officer patted down Robinson's outer garments and felt an unidentifiable object in a coat pocket. After removing a crumpled cigarette pack and, believing it did not contain cigarettes, the officer opened it and found several heroin capsules.[98] Robinson argued that the officer should have conducted only a limited frisk to discover weapons or concealed evidence of a crime. The Supreme Court rejected this argument and held that a full search of an individual incident to a lawful custodial arrest is reasonable under the fourth amendment.[99] The *Robinson* Court did not find a need for ad hoc justifications of these searches, explaining:

> The authority to search the person incident to a lawful custodial arrest . . . does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.[100]

Thus, the *Robinson* Court abandoned case-by-case adjudication in favor of a "bright line" rule.[101] As Justice Powell explained, "an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person."[102]

The Supreme Court has had difficulty defining the area within

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95. *See* Weeks v. United States, 232 U.S. 383, 392 (1914).

96. Agnello v. United States, 269 U.S. 20, 30 (1925); Weeks v. United States, 232 U.S. at 392; *see* Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964).

97. 414 U.S. 218 (1973). The Supreme Court addressed the question of a search incident to an illegal arrest in Beck v. Ohio, 379 U.S. 89 (1964).

98. 414 U.S. at 220-23.

99. *Id.* at 227.

100. *Id.* at 235.

101. For a general discussion of the implications of the "bright line" rule established in *Robinson*, see LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127.

102. 414 U.S. at 237 (Powell, J., concurring).

a person's control that may be searched incident to arrest. In *Harris v. United States,* the Court held that the warrantless search of a four-room apartment was constitutional as a search of the area under the control of the arrested occupant.[103] Following the same reasoning, the Court in *United States v. Rabinowitz* upheld the warrantless search of a one-room office incident to the occupant's arrest.[104] But in *Chimel v. California,*[105] the Court excluded evidence obtained during a warrantless search of an entire house, overruled *Harris* and *Rabinowitz,* and held that such extensive warrantless searches were unreasonable under the fourth amendment.[106]

The *Chimel* Court recognized that these unrestricted searches could result in abusive police tactics: "[O]ne result of decisions such as *Rabinowitz* and *Harris* is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere."[107] The Court defined the permissible standard for a warrantless search incident to arrest as the area within the arrestee's immediate control. This is the area in which an arrestee can reach a weapon or destroy evidence.[108] The Court did not delineate the exact boundaries of the area within a suspect's immediate control, but concluded that "[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself."[109]

United States courts of appeals have had difficulty defining the area within the arrestee's immediate control, particularly when officers have searched the interior of a car no longer occupied by the arrestee. Although some courts have held these searches constitutional,[110] other courts have not.[111] Because an important function

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103. 331 U.S. 145, 152-53 (1947).

104. 339 U.S. 56, 63-64 (1950).

105. 395 U.S. 752 (1969).

106. *Id.* at 763, 768.

107. *Id.* at 767.

108. *Id.* at 763.

109. *Id.*

110. *E.g.,* United States v. Sanders, 631 F.2d 1309 (8th Cir. 1980); United States v. Dixon, 558 F.2d 919 (9th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978); United States v. Frick, 490 F.2d 666 (5th Cir. 1973).

111. *E.g.,* United States v. Benson, 631 F.2d 1336 (8th Cir. 1980); United States v. Rigales, 630 F.2d 364 (5th Cir. 1980).

of the fourth amendment is to regulate police conduct,[112] the *Belton* Court recognized the need for a "bright line" rule that officers could easily understand and apply.[113]

The *Belton* Court, interpreting *Chimel's* definition of the area within the arrestee's immediate control, held that a police officer may search the passenger compartment of an automobile incident to the lawful custodial arrest of its occupant. The Court stated that the passenger compartment was a "relatively narrow" area from which an arrestee could reach weapons or evidence.[114] The majority also relied on *Robinson* to justify a policeman's search of the contents of any container found in the passenger compartment, reasoning that "if the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach."[115]

Belton is not, however, truly analogous to *Robinson.* When an officer arrests a person, there is a continuing risk that the arrestee can reach a weapon or destroy evidence concealed on his person.[116] That risk is nonexistent in a routine search of a car's passenger compartment. Once the arrestee is removed from the automobile, any weapons concealed in the car cannot endanger the officer. Further, the arrestee cannot return to the car to destroy evidence. Unless the officer has probable cause to believe that the car contains evidence of a crime, he has no justification for searching it.[117]

The *Belton* holding allows searches that unjustifiably invade a person's reasonable expectation of privacy. It presumably authorizes the search of a car's passenger compartment even if the arrestee is handcuffed and in a patrol car.[118] This "bright line" rule also invites abusive police tactics. For example, if an officer has probable cause to arrest someone, he may justify a warrantless search of an automobile's passenger compartment and its contents by delaying the arrest until the passenger enters the car.[119] Other fourth

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112. *See* New York v. Belton, 453 U.S. at 458 (quoting LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 SUP. CT. REV. 127, 141.

113. 453 U.S. at 460.

114. *Id.*

115. *Id.* The Court concluded that Belton was lawfully arrested and that his jacket was within his "area of immediate control." *Id.* at 462. The Court did not consider whether Belton could actually reach the jacket.

116. *See* United States v. Robinson, 414 U.S. at 234-35.

117. *See* New York v. Belton, 453 U.S. at 466-68 (Brennan, J., dissenting); *id.* at 472 (White, J., dissenting).

118. *Id.* at 468 (Brennan, J., dissenting).

119. This is the same problem that the court attempted to avoid by overruling *Harris* and *Rabinowitz. See supra* text accompanying note 107.

amendment violations arise when an officer uses minor traffic violations as a pretext for searching a container in the passenger compartment without a warrant.[120]

The *Belton* Court's "bright line" rule frequently will be easier for police officers to apply than the "area of immediate control" test. In some situations, however, the rule may prove to be ambiguous. For example, the distinction between a vehicle's passenger compartment and trunk is not readily apparent in station wagons, hatchbacks, buses, and vans.[121] The *Belton* "bright line" rule does not guide police officers when they search one of these vehicles without a warrant, but instead invites confusion by failing to recognize the owner's legitimate expectations of privacy.

VI. THE "BRIGHT LINE" RULES

In accomplishing its goal of providing "bright line" rules that police can apply easily, the Supreme Court has restricted the automobile exception and expanded the scope of the search incident to arrest exception.[122] When the police have probable cause both to search a car and to arrest its occupant, the expanded search incident to arrest exception, rather than the restricted automobile exception, now justifies a search of the car's entire passenger compartment and any containers found there. In some respects, however, the automobile exception can accommodate the legitimate needs of law enforcement officers better than the search incident to arrest exception. Only the automobile exception authorizes the police to open a car's trunk.[123] Furthermore, a search incident

120. In most jurisdictions officers have discretion in determining whether to issue a citation or arrest a driver for minor traffic violations. *See* United States v. Robinson, 414 U.S. at 248 (Marshall, J., dissenting). If an officer stops a car for a traffic violation and sees a container in the car that he wants to search, he can exercise his discretion and arrest the driver. An officer who wants to search a particular car, but lacks probable cause, can simply follow the car until the driver commits a minor traffic violation and search it incident to arrest. *See* Robbins v. California, 453 U.S. at 450-51 nn.11-12 (Stevens, J., dissenting); LaFave, *supra* note 101, at 152-55.

121. 453 U.S. at 470 (Brennan, J., dissenting). Justice Brennan states that the Court's new rule will not end litigation over the permissible scope of the search incident to arrest. In addition to the doubtful distinction between the passenger compartment and the trunk of a car, he questions exactly how long after an arrest the police may conduct a search under the "contemporaneous" requirement and concludes that the issue will be the subject of future litigation. Brennan also queries whether probable cause to arrest must occur before the occupant leaves his car. *Id.*

122. *See* Robbins v. California, 453 U.S. at 444 (Stevens, J., dissenting).

123. *See id.*, 453 U.S. at 428-29; Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Robinson, 533 F.2d 578 (D.C. Cir. 1976); United States v. Chapman, 474 F.2d 300

to an arrest must be contemporaneous with the arrest, but the automobile exception authorizes the police to seize a car, take it to the police station, and search it there.[124] These differences are reasonable because the automobile exception, unlike the search incident to arrest exception, requires probable cause that the automobile contains contraband or evidence of a crime.[125]

When probable cause to search the car and probable cause to arrest its occupants do not exist simultaneously, the restricted automobile exception can produce unreasonable results. If an officer has probable cause to search a container in a car, but does not have probable cause to arrest its occupant, then he must seize the container and obtain a search warrant from a magistrate.[126] The car's occupant must choose between consenting to the search or having the police deprive him of his possessions while the officer obtains a warrant.[127]

On the other hand, when there is probable cause only to arrest the occupants, the officers may search incident to the arrest any containers located in the passenger compartment. The police cannot justify opening the discovered containers by the need to secure weapons or destructible evidence that possibly may be inside. Seizure of the containers accomplishes these objectives.[128] Delaying the search while the officer attempts to obtain a warrant will not

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(5th Cir. 1973).

124. *Compare* Chambers v. Maroney, 399 U.S. 42 (1970) (under automobile exception police could permissibly conduct subsequent warrantless search of car at station house) *with* Preston v. United States, 376 U.S. 364 (1964) (although police could have searched car incident to its occupants' arrest, subsequent warrantless search was invalid as too remote in time and place).

125. Robbins v. California, 453 U.S. at 447-49 (Stevens, J., dissenting).

126. *See id.* at 432 (Powell, J., concurring). *Robbins* would be decided the same way even if there were no arrest because the search incident to arrest exception was not before the Court. *Id.* Police often have probable cause to make an investigatory stop of a vehicle and search for evidence of a crime before they have probable cause to arrest the driver. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925); United States v. Thompson, 558 F.2d 522 (9th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); United States v. Payne, 555 F.2d 475 (5th Cir. 1977); United States v. Stricklin, 534 F.2d 1386 (10th Cir.), *cert. denied*, 429 U.S. 831 (1976).

127. As a result, courts will constantly be required to determine if the consent was truly voluntary. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Officers are likely to use the threat of obtaining a warrant and detaining the person and his property in an attempt to obtain consent. United States v. Ross, 655 F.2d 1159, 1199 (D.C. Cir.) (en banc) (Wilkey, J., dissenting), *cert. granted*, 102 S. Ct. 386 (1981); *see* Comment, *Consent to Search in Response to Police Threats to Seek or to Obtain a Search Warrant: Some Alternatives*, 71 J. CRIM. L. & CRIMINOLOGY 163 (1980); Comment, *Drug Trafficking at Airports—The Judicial Response*, 36 U. MIAMI L. REV. 91, 108 n.112 (1981).

128. New York v. Belton, 453 U.S. at 466-68 (Brennan, J., dissenting).

inconvenience the arrestee because he is in police custody. Furthermore, a neutral magistrate will reject the officer's petition for a search warrant when there is no probable cause to believe that the container holds contraband or evidence of a crime.[129]

This surprising result can be explained. In *Robbins* the Court reasoned that an automobile occupant has a high expectation of privacy in the contents of a closed opaque container. No matter how great the probable cause to search, the expectation of privacy remains and a warrantless search is per se unreasonable.[130] Yet, the moment a car's occupant is subjected to a lawful custodial arrest, the Court's reasoning in *Belton* implies that he has no significant expectation of privacy in his person or in the contents of any containers located in his car's passenger compartment. Because a search incident to an arrest does not invade any legitimate expectation of privacy, the search becomes reasonable by definition. Therefore, a magistrate's determination of the reasonableness of the search becomes unnecessary.[131]

The Court is effectively telling the police that if they want to search a container located in a car's passenger compartment, they must first arrest the car's occupant. This is likely to promote pretext arrests.[132] A rule that fosters these police tactics undermines the very rights the fourth amendment is intended to protect.

Although one can reconcile the Court's new rules, they impair the legitimate needs of law enforcement officers and permit the unjustifiable invasion of an individual's legitimate expectation of privacy. In his dissent in *Robbins*, Justice Stevens correctly reasoned that the Court should have upheld the searches in *Robbins* and *Belton* under the automobile exception.[133] Under this exception, an individual's expectation of privacy in the contents of a paper bag or a suitcase cannot be invaded unless the police have probable cause to search the car in which it is located.[134]

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129. *See* Robbins v. California, 453 U.S. at 452 (Stevens, J., dissenting).

130. 453 U.S. at 420; *see* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

131. *See* New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973).

132. *See* United States v. Robinson, 414 U.S. at 248 (Marshall, J., dissenting); LaFave, *supra* note 101, at 150-55.

133. Robbins v. California, 453 U.S. at 447 (Stevens, J., dissenting).

134. *Id.* at 451-52.

VII. The Reconsideration Begins

The Supreme Court has granted certiorari in *United States v. Ross*,[135] indicating that it is already beginning to reconsider the rules established in *Robbins*. In *Ross* a reliable informant told a police officer that Ross was selling narcotics and keeping drugs in the trunk of his car.[136] The informant told the officer where Ross's car was located, and gave the officer a description of both Ross and the car. Several officers went to the location and saw Ross driving his car. They stopped the car and ordered Ross to step out of the vehicle.[137] After arresting and handcuffing Ross, the officers opened the trunk of the car and found a folded, but untaped, paper bag and a zippered leather pouch. One of the officers opened the paper bag and discovered glassine envelopes containing heroin.[138] Leaving the paper bag and leather pouch in the trunk, the officers drove Ross's car to the police station where they opened the leather pouch and discovered $3,200 in cash.[139]

The trial court denied Ross's motion to suppress the heroin and the cash, and the jury convicted him of possession with the intent to distribute narcotics.[140] On appeal, a divided panel of the Court of Appeals for the District of Columbia held that although the search of the leather pouch was unconstitutional, the fourth amendment did not prevent the police from opening the lawfully seized paper bag without a warrant.[141] The panel decision was vacated, and at the rehearing en banc, the government conceded that the leather pouch was indistinguishable from the type of luggage that the Supreme Court, in *Arkansas v. Sanders*,[142] held free from a search without a warrant.[143] The government argued, however, that *Sanders* did not forbid the warrantless search of the paper bag.[144] The District of Columbia Circuit rejected this argument and held that the warrantless search of the paper bag was uncon-

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135. 655 F.2d 1159 (D.C. Cir.) (en banc), *cert. granted*, 102 S. Ct. 386 (1981).

136. *Id.* at 1162.

137. *Id.*

138. *Id.* Although the officers searched Ross's paper bag contemporaneously with his arrest, the government did not contend that the search was incident to arrest. *Id.* at 1168-69.

139. *Id.* at 1162.

140. *Id.*

141. United States v. Ross, No. 79-1624, slip op. at 15-16 n.6 (D.C. Cir. Apr. 17, 1980), *rev'd*, 655 F.2d 1159 (D.C. Cir.) (rehearing en banc), *cert. granted*, 102 S. Ct. 386 (1981).

142. 442 U.S. 753 (1979).

143. 655 F.2d at 1161 & n.3.

144. *Id.* at 1161, 1166.

stitutional. The court applied the rule established in *Sanders* to prevent the warrantless search of both the paper bag and the leather pouch.[145] The court reasoned that *Sanders* did not establish a "worthy container" test that would determine the validity of warrantless searches according to the type of container searched.[146]

The Supreme Court granted certiorari in *United States v. Ross*[147] to decide whether the warrantless search of the paper bag was constitutional. The Court has instructed the parties to argue whether it should reconsider *Robbins*.[148] *Ross* will provide the Court with an opportunity to decide whether the nature of a container determines the validity of a warrantless search of that container. In contrast to *Robbins*, *Ross* will also provide the Court with an opportunity to settle the issue whether the automobile exception affects the warrant requirement for container searches.

The Supreme Court in *Ross* probably will uphold the search of Ross's paper bag, although the Court's precise holding is difficult to predict. A majority of the Justices believe that the nature of a container does not affect the validity of a warrantless search.[149] A possible majority of the Court believes that the automobile exception should allow the warrantless search of at least some containers located in a car.[150] These two majorities do not, however, consist of the same Justices.[151] Justice Stewart's recent resignation from the

145. *Id.* at 1170-71.

146. *Id.* at 1161, 1170-71. The District of Columbia Circuit stated that if different types of containers and various methods of closure were the decisive factors for assessing the validity of a warrantless search, the police would be required to make fine distinctions in determining whether to proceed with a search. Had Ross sealed, rather than folded the paper bag, a court might have held that the police needed a warrant to search it. *Id.* Further, under this theory, a paper bag might not be subject to a warrantless search if it were found among suitcases. *Id.* at 1170 n.28. Ross's paper bag was discovered alongside a leather pouch which the government later conceded was analogous to luggage. *Id.* at 1168, 1170 n.8. It is unclear whether a single, luggage-like, adjacent container would protect a paper bag from a warrantless search or whether the bag would remain vulnerable unless surrounded by several pieces of luggage. *Id.* at 1170 n.8.

147. 102 S. Ct. 386 (1981).

148. *Id.*

149. This majority includes Justices White, Brennan, and Marshall, who joined the *Robbins* plurality, and Justices Rehnquist, Blackmun, and Stevens, who dissented in *Robbins*. *See supra* notes 38-47 and accompanying text.

150. This hypothetical majority would include Justices Rehnquist, Stevens, Blackmun, and possibly Chief Justice Burger and Justice Powell. *See supra* notes 67-78 and accompanying text.

151. Only Justices Rehnquist, Blackmun, and Stevens have expressed the belief that the automobile exception should permit the warrantless search of a car and any containers found inside. *See supra* notes 67-69 and accompanying text. The desirability of avoiding a "worthy container" test is likely to enable these Justices to find support for their position among the other members of the Court.

Court, and Justice O'Connor's recent appointment, make the final outcome of *Ross* even more uncertain.

In deciding *Ross*, the Court should hold that when the police have probable cause to stop and search a car, they may conduct a warrantless search of the entire car and any containers found inside.[152] The police officers in *Ross* indisputably had probable cause to believe that contraband was located in the trunk of Ross's car.[153] This probable cause, combined with the diminished expectation of privacy commonly associated with automobiles, gave the officers authority to open Ross's trunk.[154] The same considerations should justify the officers' warrantless search of the containers found inside Ross's car. This holding would be in accordance with the numerous United States courts of appeals cases decided before the Supreme Court's decision in *United States v. Chadwick*.[155] Before *Chadwick* the circuit courts routinely held that the automobile exception authorized both the warrantless search of a car and any containers found inside.[156]

In establishing the automobile exception as a limitation on the warrant requirement for container searches, the Court would not be compelled to overrule *Chadwick*, *Sanders*, or *Robbins*. Neither *Chadwick* nor *Sanders* were automobile exception cases.[157] As Justice Stevens has noted, when the police have probable cause to search a container and an opportunity to seize it, they cannot jus-

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152. The Court may also decide that the automobile exception applies because the focus of the search in *Ross* was on the car rather than on a particular container. Chief Justice Burger advocated this distinction in his concurring opinion in *Sanders*. *See supra* notes 77-78 and accompanying text. It is difficult, however, to find a logical rationale for this distinction. If applied in *Ross*, the search of the paper bag would be upheld because the informant stated only that Ross was keeping narcotics in the trunk of his car. Alternatively, if the informant had told the officer that Ross was keeping the narcotics in a paper bag located in the trunk, the warrantless search would be invalid because the officer would have had to obtain a warrant before searching the bag. *See* United States v. Ross, 655 F.2d at 1201 (Wilkey, J., dissenting).

153. 655 F.2d at 1168 & n.22.

154. *Id.* at 1169.

155. 433 U.S. 1 (1977).

156. *See, e.g.*, United States v. Tramunti, 513 F.2d 1087, 1104-05 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); United States v. Issod, 508 F.2d 990, 993 (7th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975); United States v. Soriano, 497 F.2d 147, 149-50 (5th Cir. 1974) (en banc), *aff'd mem. sub nom.* United States v. Aviles, 535 F.2d 658 (1976), *cert. denied*, 433 U.S. 911 (1977); United States v. Evans, 481 F.2d 990, 993-95 (9th Cir. 1973). Many courts decided these cases without even considering whether the search of a container located in a car presented an issue different than the search of the car itself. *See, e.g.*, United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973); United States v. Garner, 451 F.2d 167 (6th Cir. 1971).

157. *See supra* notes 70-78 and accompanying text.

tify a warrantless search under the automobile exception by waiting until someone places the container into a car.[158] Because the *Robbins* plurality relied on *Chadwick* and *Sanders,* and did not consider the automobile exception, the Court could interpret *Robbins* as having held only that closed opaque containers may not be searched without a warrant.[159]

Allowing the warrantless searches of all containers under the automobile exception would preserve the Court's policy of creating "bright line" rules that both the courts and the police can easily understand and apply. In future cases, parties would litigate only two issues concerning the warrantless search of a container located in a car: First, did the officer have probable cause to search the car? Second, did the officer have probable cause to search and an opportunity to seize the container before it was placed in the car? Because both the police and the courts are accustomed to evaluating probable cause, these issues may be easily addressed. When attempting to justify a warrantless search of a container found in a car, an officer will simply explain when he had the first opportunity and probable cause to seize the container.

VIII. CONCLUSION

Reinstating the automobile exception as a specific limitation to the warrant requirement for container searches will promote legitimate needs of law enforcement officers. It will also reduce the need for expanding the search incident to arrest exception as a substitute for the restricted automobile exception. Therefore, the Court should reconsider the *Belton* decision.

Restricting *Belton,* however, will have to wait until the injustices resulting from *Belton*'s "bright line" rule are before the Court. When those injustices arise, the Court should hold that when the driver of an automobile is arrested and there is no probable cause to search his car, any warrantless search incident to arrest should be strictly limited to preventing the suspect from se-

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158. Robbins v. California, 453 U.S. at 446-47 (1981) (Stevens, J., dissenting); *see supra* note 72 and accompanying text.

At times the police might find it advantageous to keep a closed container under surveillance in order to acquire evidence against additional suspects. *See* United States v. Chadwick, 433 U.S. 1 (1977); United States v. Anderson, 500 F.2d 1311 (5th Cir. 1974). This rule would not prohibit the police from maintaining the surveillance and seizing the containers when, in their judgment, it was most appropriate. Instead, it would merely require that when the police delay seizing a container, they must obtain a warrant before searching it. *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

159. *See supra* note 75 and accompanying text.

curing a weapon or destroying evidence. Rather than routinely searching a car in the absence of probable cause, the police can usually accomplish these objectives by removing the occupant from the car. Limiting the application of *Belton* would reestablish a motorist's legitimate expectation of privacy in the contents of his car.

By reinstating the automobile exception and limiting the search incident to arrest exception, the Court would hold fast to "established principles" for defining exceptions to the warrant requirement. These limited exceptions would more adequately strike the necessary balance between society's need for effective law enforcement and an individual's legitimate expectation of privacy.